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Supreme Court of the United States

October Term, 1963

No. 977

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellant

vs.

JONES MOTOR CO., INC.

APPELLANT'S REPLY TO MOTION TO AFFIRM OF JONES MOTOR CO., INC.

On Appeal from the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 32629.

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APPELLANT'S REPLY TO MOTION TO AFFIRM OF JONES MOTOR CO., INC.

I. The present case is not res judicata since the former reversal was solely on jurisdictional grounds.

In *Jones Motor Co., Inc. v. Pa. P. U. C.*, 361 U. S. 11, your Honorable Court reversed the judgment of the Superior Court of Pennsylvania on the ground that the State of Pennsylvania has no jurisdiction to determine whether the Jones Motor Co., Inc. was committing a subterfuge of its jurisdiction, since such jurisdiction lies with the Interstate Commerce Commission in the first instance. A previous ruling of similar import had been declared in *Service Storage and Transfer Co., Inc. v. Commonwealth of Virginia*, 359 U. S. 171, and that case was cited in the *per*

curiam reversal in the 361 U. S. 11 decision. The fact that the P. U. C. thereafter filed a Petition for Reconsideration and Clarification, which is often done by the losing party, which was denied, can have no legal significance apart from the original decision.

Your Order denying this Petition appears in 361 U. S. 904. The Jones Motor Co., Inc. in its Motion to Affirm unhappily creates some confusion by referring to the Court's denial of this petition as "the second Jones case" (p. 12, Motion to Affirm). Lest the Court be confused by it, appellant wishes to point out that there was no second case as such, only a petition for reconsideration.

Since the reversal was based on the *Service Storage* case which contained the instruction to the Commonwealth of Virginia to file a complaint before the Interstate Commerce Commission if it believed that *Service Storage* was not operating in bona fide interstate commerce, this Commonwealth then filed its complaint before the Interstate Commerce Commission, which has now resulted in this appeal. This is the second case therefore!

A reversal for want of jurisdiction can hardly be considered *res judicata*. The law in this regard was recently reiterated in *Costello v. U. S.*, 365 U. S. 265, 285-286, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961), wherein your Honorable Court said:

> "At common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim. In Haldeman v. United States, 91 U. S. 584, 585-586, 23 L. Ed. 433, which concerned a voluntary nonsuit, this Court said, 'there must be at least one decision on a right between the

parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit. * * * There must have a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmative.' A similar view applied to many dismissals on the motion of a defendant. In Hughes v. United States, 4 Wall. 232, 237, 18 L. Ed. 303, it was said: 'In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or **the want of jurisdiction,** or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.' (Cases cited)." (Emphasis added.)

In *Restatement of Judgments,* Section 65(2), it is stated:

"2) Where a judgment is rendered in favor of the defendant because the plaintiff seeks a form of remedy which is not available to him, the plaintiff is not precluded from subsequently maintaining an action in which he seeks an available remedy."

In the same *Restatement,* Sec. 49, it is also stated:

"Where a valid and final personal judgment not on the merits is rendered in favor of the defendant, the plaintiff is not thereby precluded from thereafter maintaining an action on the original cause of action and the judgment is conclusive only as to what it actually decided."

In the comment to that section an example is given: "Where the judgment is based on the lack of jurisdiction of the Court over the defendant or over the subject of the action . . ."

So far, everyone who has been asked to decide that the first Jones case was a decision on the merits and hence res judicata has ruled the opposite.

The Hearing Examiner in the *Arrow* case, e.g. said:

> "The record indicates that the Supreme Court's ruling in the Jones case was a procedural ruling to enable P. U. C. if it believed that Jones' operation was not bona fide interstate but merely a subterfuge to escape its jurisdiction, to avail itself of the remedy Congress has provided in section 204(c) of the Act."
>
> P. 21a, Motion to Affirm of Pa. P. U. C. in 375 U. S. 452

When the contention was made before Division 1, they said:

> "We are satisfied that no other issue but that of jurisdiction was dealt with by the court in the Service case. Accordingly, we do not regard it as a decision on the merits of the issues under consideration here. It follows, then, that the Jones case, supra, involving an operation comparable to those complained of in the Service case, and reversed, Per Curiam, by the Supreme Court on the strength of the Service case, is similarly of jurisdictional import."
>
> P. 50a, Motion to Affirm of Pa. P. U. C. in 375 U. S. 452. See 83 M. C. C. 729.

The issue was not further discussed in the remaining course of the *Arrow* case up to your Honorable Court: 375 U. S. 452.

When the matter was raised before the Hearing Examiner in this case he said in his Corrected Recommended Report and Order, as follows:

> "Division 1 in Pa. P. U. C. v. Hudson Transp. Co., 83 M. C. C. 729, interpreted the Supreme Court's decisions in the Service and Jones cases as of jurisdictional import, that what the Supreme Court held was that determination of the validity of the challenged operations was within the jurisdiction of the Commission rather than that of the P. U. C., and that there had been no decision on the merits by the Supreme Court. Therefore, the doctrine of res adjudicata does not apply, and it is recommended that the motion to dismiss the complaint be overruled." J. S. P. U. C., p. 96.

Division 1 in the *Jones* case adopted the same approach (J. S. P. U. C., p. 85). The District Court below did not discuss this issue.

We submit that the previous case is not res judicata of the present case now before your Honorable Court.

II. Appellee makes erroneous references to the evidence in its Motion to Affirm.

A. In its statement of facts contained in its Motion to Affirm appellee makes a number of erroneous references to the facts. E.g. in paragraph 8 Jones claims "ex-

press authority to combine'' its routes and refers to Exhibit 5.

No such finding was made by the I. C. C. in this case. It is true that the District Court made such a finding, but, we submit, without justification. Aside from the fact that the District Court is not a fact-finding body, the District Court did not appreciate the true significance of the phrase Jones is urging to authorize its subterfuge. It is interesting to note that Jones never once argued in its briefs before the Interstate Commerce Commission that the I. C. C. in MC-F-4955 had specifically authorized the exact combination of rights as Jones is now using to justify its operations. The clause in question appeared in a transfer proceeding of rights from Clinton Motor Express to the Jones Motor Co., Inc. concerning rights from Philadelphia to New York, and vice versa. The clause which Jones is attempting to use out of context is inserted in practically all transfer orders to eliminate duplicating authority. In other words, if Jones already had a right to go between Philadelphia and Trenton and it acquired a right to go between Phila. and New York City and all intermediate points, of which Trenton would be one, what the I. C. C. is saying by that clause is that these rights are to be unified and duplications eliminated, so that after the transfer Jones does not still maintain two separate sets of rights one from Phila. to Trenton and the other from Phila. to New York City so that it could thereby sell this Phila. to Trenton right or parts thereof. Otherwise, some carriers after acquisitions would continue to have five or 10 or more duplications of segments of rights along various routes, and such carrier could then go into the business of bartering the rights which are duplicated. It was to prevent this that the standard clause which Jones now

cites was inserted into its transfer proceeding. This reference has no materiality to this case and was given no consideration by the I. C. C. The District Court entered perilous ground when it entered upon this area on its own without the expertise of the I. C. C. to guide it.

B. In paragraph 10 of its Motion To Affirm Jones mischaracterizes Exhibits 7, 8, 9 and 10. Jones claims that these exhibits reveal traffic handled by the same consignors and the same consignees as those involved in the shipments in this case. These exhibits merely contain locations of cities and places and no mention is made of any consignor or consignee. Your Honorable Court is urged to consult these exhibits to see for yourselves that the claims made for these exhibits are unsupported by them.

C. Jones in its recital of the evidence sets forth its view of the evidence eliminating and mischaracterizing evidence that the I. C. C. had and could accept by way of direct testimony, or inference, to support the conclusions reached by the I. C. C. in this case. We shall not reiterate all such evidence at this time, but let the various reports of the I. C. C. speak for themselves. Suffice it to say, that many of the facts were stipulated to and agreed upon and this, together with other evidence supporting reasonable inferences, entitled the I. C. C. to draw the conclusion of subterfuge.

D. In paragraph 12 of its Motion To Affirm, Jones speaks of Exhibit 12 in a manner tending to give that exhibit some relevancy to this proceeding. That exhibit did show lawful interstate operations of Jones from Philadelphia to New Jersey, etc. We never assailed such operations and freely admit that Jones does engage in bona fide

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interstate operations when it transports between Pennsylvania and New Jersey or any two other states. Exhibit 12 merely shows transportation between two states. The transportation contained in Exhibit 12 moved during the day and at different times than the transportation involved in the complaint. It has no materiality to the issues in this case.

E. Jones in paragraph 13 contends that there was no concealment. A carrier can commit a subterfuge without adopting all the aspects of secrecy. A carrier can do something for years before a State regulatory body can catch up with it. This do not mean that because it was getting away with it for several years, it is legal. On the other hand, it is interesting to note that Jones had applied for the same rights between Philadelphia and Allentown by direct routes in Pennsylvania and was turned down by the Superior Court of Pennsylvania in *Modern Transfer Co. v. P. U. C.*, 179 Pa. Superior Ct. 46, 115 A. 2d 887 (1955), because of the adequacy of existing service. If Jones already had the right I. C. C.-wise, why was it applying for P. U. C. rights for the same thing during the period it claims it was openly operating?

Also on this point of concealment, when Jones was asked about how many pounds it is transporting between Philadelphia and Allentown daily by way of New Jersey routes, and other pertinent questions about its operations at the hearing, its chief and only witness had remarkable lapses of memory. Its good faith can be challenged on more than one basis. Moreover, when the hearing was held in the first case before the P. U. C., Jones never even mentioned any commingling at all and had no such exhibits. The first time such exhibits ever appeared was at the

hearing before the I. C. C. without, incidentally, any prior notice to the P. U. C. or its counsel. A reading of the testimony of the Jones witness regarding these exhibits also reveals a disposition to be something less than frank.

III. The Arrow case controls points which appellee seeks to reargue in its Motion to Affirm.

Appellee instead of discussing the *Arrow* case and its meaning to the present case cites and discusses such cases as *Missouri Pacific Railroad Co. v. Roy Stroud*, 267 U.S. 404 (1925), and *Hanley v. Kansas City Southern Ruy. Co.*, 187 U. S. 617 (1903), which have no relevancy to the issues.

Appellee in its Motion to Affirm is obviously attempting to reargue matters covered by the *Arrow* decision of your Honorable Court. No one denies that Jones is engaging in interstate commerce under the definition of the Interstate Commerce Act and it is for that reason that the I. C. C. had jurisdiction in this case. But what Jones overlooks is the power of the I. C. C. to pass upon the question of subterfuge if such be the case.

The District Court in the *Arrow* case in making mention of the contrary result reached by the District Court in the *Jones* case, stated in passing that the facts are different anyhow, assuming the facts to be those set forth by the Pennsylvania District Court in its Opinion. These facts, however, as we have demonstrated in our Jurisdictional Statement are incorrect and inaccurate and do not represent the view of the evidence that the I.C.C. had a right to take in reaching its conclusions. Moreover, it

is obvious that many of the legal statements set forth in the *Arrow Carrier* opinion differ substantially from the legal position set forth by the District Court of Pennsylvania in its opinion. The *Arrow Carrier* decision therefore was not an appropriate forum to review the correctness of the decision of the District Court in the *Jones* case. In fact neither party argued or brief the *Jones* case to the N. J. District Court hearing the *Arrow Carrier* case since the former decision came out after briefing and argument in the *Arrow Carrier* case had been concluded. Therefore, any references to the *Jones* case in the *Arrow Carrier* opinion or by the U. S. Attorney's Office must be taken to mean that IF the evidence of the *Jones* case compels a finding of no subterfuge, such evidence would nevertheless be different from that in the *Arrow Carrier* case. The legal principles would however be the same. The proper place to review the *Jones* case is now before your Honorable Court and it is our submission that the facts in the *Arrow Carrier* case concerning the Arrow Carrier Corporation and the Hudson Transportation Co. are almost identical to the case at bar and call for a similar decision.

CONCLUSION

No attempt has been made to belabor the contention that the *Jones* case and the *Arrow* case cannot both stand together as authority. The *Jones* case, if allowed to stand, would cut the guts out of the *Arrow* decision and leave the States helpless to cope with motor carrier subterfuge. The type of subterfuge engaged in by Arrow,

by Hudson, and now by Jones, is being engaged in by many others. Proper legal authority is therefore necessary to enable the States to take legal action on behalf of their carriers and the citizenry to stamp such practices out. All over the country the States are waiting with watchful eye for such a decision in this *Jones* case.

We respectfully submit that the decision of the District Court of Pennsylvania was wrong and should be reversed on the basis of *Arrow Carrier Corporation v. U. S.*, 375 U.S. 452.

Respectfully submitted,
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